

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SOFTWARE FREEDOM CONSERVANCY,  
INC. and ERIK ANDERSEN,

Plaintiffs,

v.

BEST BUY CO., INC., SAMSUNG  
ELECTRONICS AMERICA INC.,  
WESTINGHOUSE DIGITAL  
ELECTRONICS, LLC, JVC AMERICAS  
CORPORATION, WESTERN DIGITAL  
TECHNOLOGIES, INC., ROBERT BOSCH  
LLC, PHOEBE MICRO, INC., HUMAX USA  
INC., COMTREND CORPORATION,  
DOBBS-STANFORD CORPORATION,  
VERSA TECHNOLOGY INC., ZYXEL  
COMMUNICATIONS INC., ASTAK INC.,  
and GCI TECHNOLOGIES CORPORATION,

Defendants.

CIVIL ACTION NO. 09-cv-10155 (SAS)

**MCGINNIS DECLARATION IN  
SUPPORT OF DEFENDANT BEST BUY  
CO. INC.'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

I, Patrick McGinnis, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am currently vice president of global product management and global engineering at Best Buy Co., Inc. ("Best Buy"). I am responsible for the teams that plan Best Buy's Exclusive Brands product lines.

2. I understand that Plaintiffs in the above-captioned litigation have filed a motion for a preliminary injunction, seeking an order enjoining Best Buy from selling Insignia brand Blu-ray DVD disc players and enjoining the distribution of allegedly infringing firmwares for those same products.

3. I have personal knowledge of the following facts.

4. Best Buy is an international retailer of consumer electronics. It does not manufacture any of the products that are sold in its stores or through its web site.

5. The Best Buy products accused in this litigation are Blu-ray DVD players that are sold under one of Best Buy's Exclusive Brands, "Insignia." Best Buy provided specifications for the Insignia Blu-ray players to Desay A & V And Technology Co., Ltd. ("Desay"), a third-party manufacturer in China. As part of its manufacturing process, Desay obtains a software chip for the Insignia Blu-ray players from a third party in the United States, Broadcom Corporation ("Broadcom"). The code accused in this litigation is entirely contained on the Broadcom Blu-ray chip.

6. Best Buy did not require that Desay use software chips from Broadcom, or that the Insignia Blu-ray players include any BusyBox code.

7. The Insignia Blu-ray DVD players are designed to allow consumers who purchase the products to update certain software on the devices, called "firmware." Firmware updates ensure that a Blu-ray player will continue to play discs as studios change the way Blu-ray discs are authored. Firmware updates also allow Best Buy to provide new services and features to consumers as they become available. Further, firmware updates ensure that Blu-ray players with internet connectivity are updated with any necessary security features, including any new Digital Rights Management ("DRM") technologies. Firmware updates are provided to consumers via a CD or DVD disc, or via the internet.

8. There are seven Insignia Blu-ray players at issue in this litigation, and only two of the seven players are currently sold by Best Buy. The NS-BRDVD4 and NS-WBRDVD2 players are currently sold by Best Buy, and contain the Broadcom software chip model 7630. The NS-BRDVD3 and NS-WBRDVD players were sold by Best Buy until last Fall, and contain

the Broadcom software chip model 7601. The NS-2BRDVD, NS-BDLIVE01 and NS-BRDVD players are no longer sold by Best Buy and contain the Broadcom software chip model 7440.<sup>1</sup>

9. Best Buy was first contacted by one of the Plaintiffs in this litigation, the Software Freedom Conservancy (“Conservancy”), on November 18, 2009. The Conservancy informed Best Buy of a potential violation of an open source software license (“the GPLv.2”) in regard to BusyBox and one of Best Buy’s Insignia Blu-ray players, the NS-WBRDVD player, and the ramifications for copyright infringement.

10. Even as Best Buy was taking steps to address the Conservancy’s concerns, Plaintiffs filed the current litigation against Best Buy and multiple other defendants on December 14, 2009.

11. Since the filing of this lawsuit, Best Buy has worked diligently with Broadcom in an attempt to comply with Plaintiffs’ requests relating to open source software source code corresponding to the object code on the Broadcom chips in the Insignia Blu-ray players.

12. To date the parties have focused on source code for the 7601 Broadcom chip, which is found in Best Buy’s NS-WBRDVD and NS-BRDVD3 Insignia Blu-ray DVD players. Best Buy has provided seven iterations of BusyBox source code to Plaintiffs for their review.

13. It is my understanding from Broadcom that the source code provided to Plaintiffs in this litigation is fully compliant with the terms of the GPLv.2 with respect to BusyBox.

14. Despite having received seven iterations of BusyBox source code, Plaintiffs have persisted, over the course of many months, to demand what I understand to be additional, open source software source code that is not related to BusyBox, as well as to demand Broadcom proprietary source code.

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<sup>1</sup> I understand that Plaintiffs have also referred to an NS-BRDVD2 player, which is not a model number for any Best Buy Insignia Blu-ray player.



15. I understand that Plaintiffs have proposed language during settlement negotiations that would give them the contractual right to evaluate and veto proposed source code for the Insignia Blu-ray products, wherein their veto rights are not limited to BusyBox code, but would apply to all open source code.

16. To date, Best Buy has provided Plaintiffs with multiple iterations of source code for the two Insignia Blu-ray player that contain the 7601 Broadcom chip. Best Buy has been unable to provide Plaintiffs with similar code for the other chips because Plaintiffs continue to also demand source code other than BusyBox.

17. Best Buy is currently making a written offer for the BusyBox source code for the NS-BRDVD4 and NS-WBRDVD2 players, which are currently sold and contain the 7630 chip. Best Buy is also currently making a written offer for the BusyBox source code for the NS-BRDVD3 and NS-WBRDVD players, which were discontinued last year and contain the 7601 chip. These offers are made in the product manuals that may be downloaded from the Best Buy web site.<sup>2</sup> The offers are also made via on-screen displays for the players.

18. I understand that Broadcom has rewritten the software on the 7630 chip to eliminate BusyBox, and that the re-written chip has been sent to Desay for inclusion in the accused products that will be manufactured going forward. Thus, Insignia players manufactured after March should no longer contain BusyBox code. In addition, firmware updates for players that already contain the 7630 chip will, after March, retroactively replace the firmware containing BusyBox with the re-written firmware that does not contain BusyBox.

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<sup>2</sup> See (<http://insigniaproducts.com/productSearch.html?query=Insignia+Blu-ray>) (user manuals); (<http://insigniaproducts.com/products/dvd-players-recorders/NS-WBRDVD.html>) (support/downloads, user manual and warranty); and (<http://insigniaproducts.com/products/dvd-players-recorders/NS-BRDVD3CA.html>) (support/downloads, user manual and warranty).

19. Should an injunction be issued in this litigation against the sale of the accused Insignia Blu-ray players and firmware updates for the same, Best Buy will suffer immediate and significant harm.

20. First, Best Buy will lose the good faith of its customers who have purchased Insignia Blu-ray players, and sales to future customers will be jeopardized. In the absence of firmware updates, players already in use by consumers would be at risk of not operating properly. Consumers will experience Blu-ray disc playback issues as the various studios that release Blu-ray discs change their authoring techniques.

21. Further, in the absence of firmware updates, consumers who own the accused players will not be assured that their connected services will continue without interruption, and in a secure fashion that includes any new DRM technologies.

22. In addition, Best Buy will lose the good faith of its customers because it will not be able to offer consumers new services or features that become available, which would normally be offered via firmware updates. For example, Best Buy has provided—via firmware updates—CinemaNow digital services and other, performance improvements for the accused devices.

23. Best Buy will further suffer harm by being unable to make any further sales of the accused Blu-ray Insignia players.

24. Finally, Best Buy will be harmed by an injunction because it has existing agreements with business partners that require Best Buy to provide firmware updates. An injunction would therefore harm Best Buy's relationships with those business partners.

I understand that the laws of the United States provide for criminal penalties for providing a false declaration or testimony. I declare under penalty of perjury that the foregoing is true and correct.

Executed on 3/4/11, in Richfield, MN.

  
Patrick McGinnis